Energoprojek (M) Holdings v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42-5 OF 1996
KC VOHRAH J
24 SEPTEMBER 1996

Criminal Law *— Housing Developers (Control and Licensing) Act 1966 — Undertaking housing development without licence — Whether offence under s 5 was a strict liability offence — Whether construction of staff quarters without any intention of selling the units amounted to having undertaken 'housing development' — Housing Developers (Control and Licensing) Act 1966 ss 3 & 5*

Land Law *— Housing developers — 'Housing development', meaning of — Whether construction of staff quarters without any intention of selling the units amounted to having undertaken 'housing development' — Housing Developers (Control and Licensing) Act 1966 ss 3 & 5*

The appellant was a company engaging in consultancy and construction works in Malaysia. It had constructed a building on its land which consisted of 12 units of apartments ('the building'). The building was at all material times intended by the appellant to be used as its staff quarters and there was no intention for any of the units to be sold. The appellant was charged for engaging in, carrying on or causing to be undertaken housing development without being in possession of a licence issued under the Housing Developers (Control and Licensing) Act 1966 ('the Act') as required by s 5(1) of the Act. The prosecution submitted that the appellant was a 'housing developer' as defined under s 3 of the Act and that it was engaged in, carrying on or causing to be undertaken 'housing development' as defined under the Act and that it had no licence to build the 12 units. The defence was that while it did engage in constructing the building, it did not engage in 'housing development' as defined under s 3 as it never had any intention to sell any of the units it was building. The sessions court convicted and fined the appellant, ruling that the offence under s 5 was a strict liability offence and that the appellant had carried on housing development without it being in possession of a licence under the Act. The appellant appealed.

Held, allowing the appeal:

The object of the Act is to protect and safeguard the interest of purchasers of houses in their relationship with housing developers. In this case, although the appellant company did engage in constructing the building, it did not engage in 'housing development' as defined under s 3 of the Act as the building was at all material times intended by the appellant to be used as its staff quarters and there was never any intention on the appellant's part to sell any of the 12 units of apartments it was building. Therefore, the appellant did not require a licence to construct the building and was not guilty of the offence charged with as the offence under s 5 of the Act is not a strict liability offence (see pp 403E–H, 404F–I and 408H).

[**Bahasa Malaysia summary**

Perayu merupakan sebuah syarikat yang terlibat dalam kerja-kerja perundingan dan pembinaan di Malaysia. Ia telah membina sebuah bangunan atas tanahnya yang terdiri daripada 12 unit pangsapuri ('bangunan tersebut'). Bangunan tersebut pada semua masa material diniatkan oleh perayu untuk digunakan sebagai rumah kakitangan dan tiada hasrat untuk mana-mana unit dijual. Perayu dipertuduhkan kerana terlibat dengan, menjalankan atau menyebabkan pembangunan perumahan dijalankan tanpa memiliki lesen yang dikeluarkan di bawah Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ('Akta tersebut') seperti yang dikehendaki oleh s 5(1) Akta tersebut. Pihak pendakwa menghujahkan bahawa perayu adalah suatu 'pemaju perumahan' sebagaimana ditakrifkan di bawah s 3 Akta tersebut dan bahawa ia terlibat dengan, menjalankan atau menyebabkan 'pembangunan perumahan' dijalankan sebagaimana ditakrifkan di bawah Akta tersebut dan bahawa ia tidak mempunyai lesen untuk membina 12 unit itu. Pembelaan adalah bahawa manakala ia memang terlibat dalam pembinaan bangunan tersebut, ia tidak terlibat dalam 'pembangunan perumahan' sebagaimana ditakrifkan di bawah s 3 kerana ia tidak pernah berhasrat untuk menjual mana-mana unit yang ia sedang bina. Mahkamah sesyen telah menyabit dan mendenda perayu, dengan mendapati bahawa kesalahan di bawah s 5 adalah satu kesalahan liabiliti ketat dan bahawa perayu telah menjalankan pembangunan perumahan tanpa memiliki lesen di bawah Akta tersebut. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan:

Objek Akta tersebut adalah untuk melindungi dan mempertahankan kepentingan pembeli rumah dalam perhubungan mereka dengan pemaju perumahan. Dalam kes ini, walaupun syarikat perayu memang terlibat dalam pembinaan bangunan tersebut, ia tidak terlibat dalam 'pembangunan perumahan' seperti yang ditakrifkan di bawah s 3 Akta tersebut kerana bangunan tersebut pada semua masa material diniatkan oleh perayu untuk digunakan sebagai rumah kakitangan dan tidak pernah timbul sebarang hasrat pada pihak perayu untuk menjual mana-mana 12 unit pangsapuri yang ia sedang membina. Maka, perayu tidak memerlukan lesen untuk membina bangunan tersebut dan tidak bersalah atas kesalahan yang dipertuduhkan kerana kesalahan di bawah s 5 Akta tersebut bukanlah kesalahan liabiliti ketat (lihat ms 403E–H, 404F–I dan 408H).]

Notes

For cases on the meaning of housing development, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1819–1821.

Cases referred to

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 MLJ 285; [1988] 1 MLJ 69 (refd)

A *Khau Daw Yau v Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335 (refd)
SEA Housing Corp Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31 (refd)

Legislation referred to

B Housing Developers (Control and Licensing) Act 1966 ss 3, 5(1), 7A(1), (3), (9), 10(2)(b), 11, 12, 24(1)(c), (d), (e)

Appeal from: Kes Tangkap No A87–743–95 (4–63–55–95) (Sessions Court, Kuala Lumpur)

C *Zakiah bte Kassim* (Deputy Public Prosecutor) for the respondent.
SB Cheah (*SB Cheah & Associates*) for the appellant.

KC Vohrah J: The appellant is a company where the major shareholders are foreigners. It is engaged in consultancy and construction works in
D Malaysia. It is not disputed that the appellant constructed a building on its land, Lot 789, Jalan Dungun, Bukit Damansara which consists of 12 units of apartments.

It is also not disputed that the said building was at all material times intended by the appellant to be used as its staff quarters. It was meant to house its expatriate staff there; there was no intention for any of the units
E of apartments to be sold.

Section 5(1) (as amended by Act A703 of 1988) of the Housing Developers (Control and Licensing) Act 1966 ('the Act') reads:

> No housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a
F licence issued under this Act.

The appellant was charged in the alternative for either engaging in, carrying on or causing to be undertaken housing development without being in possession of a licence issued under the Act.

G It was the prosecution's case that the appellant was a 'housing developer' as defined under s 3 of the Act and that it was either engaged in, carrying on or causing to be undertaken 'housing development' as defined under s 3 of the Act and that it had no licence to build the 12 units of apartments.

H The appellant's defence was that while it did engage in constructing the said building, it did not engage in 'housing development' as defined under s 3 of the Act as it never had any intention to sell any of the units of apartments it was building.

The sessions court ruled that the offence under s 5 was a strict liability offence and that the appellant had carried on housing development
I without it being in possession of a licence under s 5 of the Act. The appellant was convicted and fined RM65,000.

The appeal was against conviction and sentence. I allowed the appeal and set aside the conviction.

In 44 *Halsbury's Laws of England* (4th Ed) para 856 relating to the object of all interpretation of a written instrument, this principle — culled from many case precedents cited therein succinctly — states that the object is to discover the intention of the author as expressed in the instrument. In relation to a statute, this is stated:

> The dominant purpose in construing a statute is to ascertain the intention of the legislature expressed in the statute, considering it as a whole and in the context.

The preamble to the Act states that the Act is, 'An Act to provide for the control and licensing of the business of housing development in West Malaysia and for matters connected therewith'. From this, we know that the business of housing development is required to be controlled and licensed. In the definition section (s 3), several expressions are defined but the key expressions are 'housing developer', 'purchaser' and 'housing development' showing that these expressions are used in the Act frequently and more importantly, that they are inextricably linked in the business of housing development. In fact throughout the Act, the scheme is to control the relationship between the 'housing developer' who carries on the business of 'housing development' and the 'purchaser', the person who purchases a house or an apartment put up under the housing development.

Section 7A requires every licensed housing developer to open and maintain a Housing Development Account (see sub-s (1)) into which purchase monies received by the developer for 'the sale of housing accommodation in the housing development ...' have to be paid (see sub-s (3)). The other subsections regulate how the account is to be operated and used. What is to be emphasized is that every licensed housing developer has to open such an account. Why is there the need for a statutory requirement for such an account (where purchase monies have to be paid into) if, as the prosecution argue, the Act is also to regulate a person who builds houses which he is not intending to sell to purchasers and therefore is not expecting any purchase money? The provision is obviously to protect the interests of the purchasers where monies are collected before the houses are completed having regard to sub-s (a) which states that s 7A shall apply to any housing development carried on by a licensed housing developer where all housing accommodation in the housing development 'will not be offered for sale and purchase before the completion of the housing development'.

Then, again, s 10(2) allows the Minister to direct the Controller of Housing to investigate into the affairs of or into the accounting or other records of any housing developer if the Minister has reason to believe that the housing developer 'is carrying on his business in a manner detrimental to the purchasers ...' (para (b)) or if an application for such an investigation is made to him and 'every such investigation shall be supported by not less than five purchasers ...'. The emphasis again is on safeguarding the interests of the purchasers.

The link between the purchasers and the developer in relation to the housing development and the obvious supervisory part played by the Minister and his officials to protect the interests of the purchasers can be seen in s 11 which allows the Minister to give direction under s 12 'for the

purpose of safeguarding the interests of the purchasers of the housing developer ...' where the licensed housing developer is unable to meet his obligations to his purchasers.

The recurring theme of safeguarding the interest of the purchasers being of paramount importance appears in s 24(1). It gives power to the Minister to make regulations for the purpose of carrying into effect the provisions of the Act and the regulations made may 'prescribe the form or forms of contracts which shall be used by a licensed housing developer, his agent, nominee or purchaser ...' (see para 2(c)), 'regulate payments ... which may be made by a purchaser either before, during or after the construction of the house, flat or other accommodation ...' (see para 2(d)), 'regulate and prohibit the conditions and terms of any contract between a licensed housing developer ... and his purchaser' (see para 2(e)).

Quite clearly, the Act is a piece of social legislation to protect house purchasers in their relationship with housing developers. This was underscored by Suffian LP in the (then) Supreme Court case of *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 at p 34 when his Lordship explained why certain paragraphs in r 12 made under the Act could not be allowed to be circumvented:

> It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy houses, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act.

This view of the purpose of the Act was echoed by VC George J (as he then was) in *Khau Daw Yau v Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335 at p 341:

> The scheme of the Housing Developers (Control and Licensing) Act 1966 and of the Rules of 1970 is to provide a measure of protection to purchasers of housing accommodation in a housing development against unscrupulous developers.

That the purpose of the Act is to protect house buyers was again observed by Mohd Azmi FJ (as he then was) in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285 at p 290. And Lord Templeman had this to say when the case went on appeal to the Privy Council [1988] 1 MLJ 69 at p 71E–F:

> [The Act] is clearly designed to protect purchasers from developers. And these purchasers need protection whether the sites are sold before or contemporaneously with and after completion of the houses.

To be noted is that the legislation is aimed at two principal and necessary parties. Firstly, there are the purchasers of houses who have to be protected. Secondly, there are the sellers, ie the developers who intend to build or are building houses for sale, from whom the purchasers are to be protected.

And it is in this context that the three definitions of 'housing accommodation', 'housing developer' and 'housing development' will have to be looked at.

Under s 3 of the Act: A

> 'Housing accommodation' includes any building, tenement or messuage which is wholly or principally constructed, adapted or intended for human habitation or partly for human habitation and partly for business premises.

Under s 3 of the Act, 'housing developer' (amended by Act A703 in 1988) means 'any person, body of persons, company, firm or society (by whatever name described), who or which engages in or carries on or undertakes or causes to be undertaken a housing development'. B

It is pertinent to see how 'housing development' was defined before amending Act A703 came into force in 1988. It is this:

> 'Housing development' means the business of developing or providing monies for developing or purchasing or of partly developing and partly providing monies for purchasing, more than four units of housing accommodation which will be or are erected by such development; and for the purposes of this definition 'develop' means to construct or cause to be constructed, and includes the carrying on of any building operations for the purpose of constructing housing accommodation in, on, over or under any land with the view of selling the same or the land which would be appurtenant to such housing accommodation. C D

It will be noticed that this definition, although loose and ambiguous, did envisage two essential parties as being involved as a result of the development, viz, on the one hand, the developer who built more than four units of housing accommodation for sale and on the other, the purchasers of such units. E

In 1988, with the amendment introduced by Act A703, this definition underwent a change and the less than elegant language reads thus:

> 'Housing development' means to develop or construct or cause to be constructed in any manner more than four units of housing accommodation and includes the collection of monies or the carrying on of any building operations for the purpose of erecting housing accommodation in, on, over or under any land; or the sale of more than four units of housing lots by the landowner or his nominees with the view of constructing more than four units of housing accommodation by the said landowner or his nominee; ... . F G

The second part of the definition gives an indication of the first part of the definition.

The second part of the definition envisages the situation where a landowner or his nominee sells more than four units of the housing lots where the units of housing accommodation have yet to be built; the landowner or his nominee sells the lots with the view of constructing more than four units of the housing accommodation. The second part of the definition is obviously aimed at protecting house purchasers from the landowner who collects down payments on the sale of houses yet to be built and who disappears after collecting the down payments. But again there are two essential parties to the situation: the seller, ie the developer, on the one hand and the purchasers on the other. H I

Contextually and on the basis of a reasonable interpretation, does not the second part of the definition flow from the first part and both are meant to cover the same two essential parties?

A As to the first part, it has to be noticed that it encompasses three limbs which fall within the definition of 'housing development' and all three limbs have left certain matters unsaid. For example, the language in the second limb — 'includes the collection of monies ... for the purpose of erecting housing accommodation in, on, over and under any land; ...' — does not state from whom the collection of monies has taken place. From partners of the firm undertaking housing development? That would not make sense; the collection must be from purchasers of the housing accommodation. Just any number of housing accommodation? Obviously not, for, contextually, the housing accommodation must relate to more than four units.

C As for the third limb, the definition 'includes ... the carrying on of any building for the purpose of erecting housing accommodation operation in, on, over or under any land'. Here again there is no number of units of housing accommodation specified. Surely, again, the units must be more than four. Are the units to be for sale although left unsaid similar to the situation in the first limb? Contextually, having regard to the purpose and scheme of the Act, it is not difficult to conclude that all the three limbs in the first part of the definition envisage the presence of purchasers of the housing accommodation and the sale of more than four units of housing accommodation to these purchasers.

To put it in another way, I think it is not difficult to see a purposed scheme in the definition of 'housing development' contextually in the light of what has been discussed so far and this involves three elements which are interlinked, a plan of purposed protection for purchasers from developers.

The *first element* relates to the act of building, in the sense of building or erecting housing accommodation. The *second element* relates to at least four units of housing accommodation being built. The *third element* must necessarily, in the context, relate to the sale of these units. In other words, the scheme envisages the following situations:

(1) The sale of more than four units of housing accommodation by the developer before he even builds the unit.

This situation has reference to the second part of the definition of housing development, ie 'or the sale of more than four units of housing lots by the land owner or his nominee with the view of constructing more than four units of housing accommodation by the said land owner or his nominee'.

(2) The building of more than four units of housing accommodation for the purpose of sale where no money has yet been collected from purchasers of the housing accommodation.

This relates to the first limb of the first part of the meaning, the primary meaning of the definition of housing accommodation, ie 'to develop or construct or cause to be constructed in any manner more than four units of housing accommodation'. Although the element of sale of the units of housing accommodation is not spelt out, the only reasonable interpretation is that that has to be read in the context of the conceptual scheme of the definition. Here the intention is to

build and sell but there is no offer to sell before the completion of the housing development.

(3) The building of more than four units of housing accommodation where money is collected for the sale of such units.

This situation has reference to the second limb of the first part of the definition of 'housing development' where the meaning 'includes ... the collection of monies for the purpose of erecting housing accommodation ...'.

(4) The carrying on of any building operations for the purpose of erecting more than four units of housing accommodation for the purpose of sale.

This situation has reference to the first part of the definition of 'housing development' where the third limb reads 'and includes ... the carrying of any building operations for the purpose of erecting housing accommodation ...'.

Here contextually the element of sale of the units must be read into the definition otherwise any person carrying on any building operations whatsoever will be caught by the definition.

To be noted is that when Act A703 amended the definition of 'housing development' it also introduced, inter alia, a new section, s 7A. This required every licensed housing developer to set up and maintain, as observed earlier, a Housing Development Account into which the purchase monies received by the licensed housing developer from the sale of housing accommodation in the housing development had to be paid, except in the situation caught by sub-s (9) of s 7A. It has to be emphasized that while sub-s (9) states that the section does not apply where all the housing accommodation (of a licensed developer's housing development) will not be offered for sale and purchase before the completion of the housing development, the subsection — in fact, s 7A — does not provide for the situation where the building of housing accommodation is not for sale at all; meaning, if a person builds more than four units with no intention to sell he is not caught by s 7A nor by the Act. It cannot be argued, as was done, that sub-s (9) to s 7A shows the intention of the new definition of 'housing development' and the introduction of s 7A were meant to catch within the ambit of the Act those who built more than four units of housing accommodation without any regard to their intention as to the purpose of building them.

The conclusion is irresistible: the appellant company was not guilty of the offence charged. The offence is not a strict liability offence. The company was building apartments for its staff, not for sale and it therefore did not require a licence to do so under the Act.

I therefore set aside the conviction and fine and ordered the fine to be refunded.

Appeal allowed.

Reported by Wong Siok Chin